MICHIGAN SUPREME COURT

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FOR IMMEDIATE RELEASE

CONSTITUTIONAL CHALLENGE TO CASINO GAMBLING COMPACTS TO BE HEARD BY MICHIGAN SUPREME COURT NEXT WEEK

LANSING, MI, September 29, 2006 – Are the state's gaming compacts with several Indian tribes unconstitutional? That is among the questions that the Michigan Supreme Court will consider in the first scheduled oral arguments of its 2006-2007 term.

Taxpayers of Michigan Against Casinos v State of Michigan involves a non-profit group's challenge to compacts covering gambling on tribal lands; the Legislature approved the compacts by concurrent resolution in 1998. The plaintiffs argue that the compacts are invalid under the Michigan Constitution, asserting that the compacts' amendatory provision, which allows the Governor to amend the compacts without legislative approval, violates the separation of powers clause. In a 2-1 decision, the Michigan Court of Appeals agreed that the compacts are unconstitutional; the State of Michigan, a defendant in the case, and intervening defendant the Little Traverse Bay Bands of Odawa Indians are seeking reversal of that ruling. The plaintiffs also appeal, arguing that the compacts are unconstitutional appropriations of state funds.

Also before the Court is *National Wine & Spirits v State of Michigan*. At issue is a state statute that prevents liquor wholesalers from also acting as wine wholesalers in some markets. There is an exception for distributors who competed with wine wholesalers before September 24, 1996 – but only in-state companies were licensed wine wholesalers before that date. In effect, the statute bars out-of-state companies from wholesale distribution of both wine and spirits in Michigan, according to the plaintiffs, who contend that the statute is unconstitutional.

The Court will also hear *Haynes v Neshewat*, in which the plaintiff, an African-American physician, claims that Oakwood physicians interfered with his staff privileges at the hospital because of his race. At issue is whether the doctor can sue under the Michigan Civil Rights Act, which provides that a place of public accommodation may not deny access or services to anyone on the basis of race or other protected characteristics. The defendant hospital argues that the act does not apply to a hospital's relationship with doctors who have staff privileges there.

In *People v Hernandez-Garcia*, the defendant challenges his conviction for carrying a concealed weapon; he contends that he took the gun away from two drug dealers, with the intention of turning the gun over to the police. At issue is the continuing validity of a 1986 Michigan Court of Appeals ruling that states that momentary innocent possession of a weapon

resulting from disarming a wrongful possessor is a valid defense to a concealed weapons charge, if the defendant intended to deliver the weapon to the police at the earliest opportunity. The Court of Appeals held in this case, however, that the 1986 case was not binding precedent under the Michigan Supreme Court's plain language analysis in *People v Pasha*, 466 Mich 378 (2002).

The remaining cases feature worker's compensation, estate, tax, governmental immunity, and procedural issues.

Court will be held on **October 3, 4, and 5**, starting at **9:30 a.m.** each day. The Court will hear oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice in Lansing.

(*Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's web site at* http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. *For further details about the cases, please contact the attorneys.*)

Tuesday, October 3
Morning Session

IN RE VANCONETT ESTATE (case no. 126758)
Attorney for plaintiffs Floyd Rau, Personal Representative of the Estate of Herbert Lee VanConett, Deceased; Joyce Ann Florip; Karen Jean Peterson; and Sandra Lee Parachos: Walter Martin, Jr./(989) 793-2525
Attorney for defendant Marianne DuRussel: Jack Weinstein/(989) 790-2242
Attorneys for amicus curiae State Bar of Michigan's Probate and Estate Planning Section: Mark K. Harder, John J. Bursch/(616) 752-2000
Trial court: Saginaw County Probate Court
At issue: A married couple made mutual wills providing that "all our property" would be disposed of according to the wills' terms. After the wife died, her widower transferred property to two people who were not named in the couple's wills. After the husband died, the beneficiaries of the wills sought to have the property returned to his estate. Was the husband free to revoke his will or to dispose of the property he inherited through his wife's will? Was the real property subject to the wills' terms?
Background: Herbert and Ila VanConett, a married couple, made mutual wills which were essentially identical. Both wills contained the following provision: "I expressly acknowledge that this Will is made pursuant to a contract or agreement entered into between my wife, Ila R. VanConett [my husband, Herbert L. VanConett], and myself for the purpose of disposing of all our property, whether owned by us as joint tenants, as tenants in common or in severalty, in the manner hereinabove in this case, my Last Will and Testament, provided …." An attestation clause in each will also stated that the will was made "pursuant to a contract or agreement" between the spouses. In addition, both wills stated that, in the event of one spouse's death, the other's will would become irrevocable. After the wife died, the husband quit claimed the

marital home to himself and a female neighbor; he also gave money to a second woman. Neither of the two women were beneficiaries of the mutual wills. The husband also withdrew one copy of the original will from the Saginaw County Probate Court Register's Office, but did not succeed in obtaining the copy held by the law firm that drafted the wills. He also executed at least one new will, in which he purported to revoke all previous wills and to leave his entire estate to one of the women. After the husband died, his estate's personal representative, and the three beneficiaries of the mutual wills, sued the two women to compel them to return the money and other property to the estate. But the trial judge ruled in the defendants' favor, finding that there was no contract to make a will, and that the husband was free to revoke his will. The judge also held that the marital home was not subject to the husband's mutual will because it passed to the husband by operation of law, outside of probate. In a published decision, the Court of Appeals reversed in part, holding that the couple did create a contract to make a will, and that the will became irrevocable when the wife died. But the husband's will was revocable; in addition, the marital home was not subject to the will, the appellate court said. The plaintiffs appeal.

HAYNES v NESHEWAT, et al. (case no. 129206)
Attorney for plaintiff Gregory Haynes, M.D.: Amos E. Williams/(313) 963-5222
Attorney for defendants Oakwood Healthcare, Inc., and Oakwood Hospital-Seaway Center: William M. Thacker/(734) 214-7646
Trial court: Wayne County Circuit Court
At issue: An African-American physician sued a hospital under Michigan's Civil Rights Act, alleging that the hospital had a racially discriminatory plan to impair his use of hospital facilities. Section 302(a) of the Civil Rights Act prohibits a place of public accommodation from denying individuals the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations it offers because of religion, race, color, national origin, age, sex or marital status. Did the defendant hospital violate Section 302(a)?
Background: Since 1991, Dr. Gregory Haynes, an African-American physician, has maintained medical staff membership and clinical privileges at Oakwood Hospital, where he handles the majority of his internal medicine practice. Haynes sued the hospital under Michigan's Civil Rights Act, claiming that Oakwood physicians interfered with his use of the hospital's facilities, and that they did so because of his race. Haynes alleged that the Oakwood Chief of Staff warned a physician who often referred patients to Haynes that the physician would have problems at the hospital if he kept making the referrals. Haynes claimed that the other physician then stopped referring patients to him, harming Haynes' practice. Haynes further alleged that he was suspended by the hospital and subjected to disciplinary review. In support of his racial discrimination claim, Haynes provided an affidavit from another physician, who stated that he heard the Chief of Staff and other physicians direct racial slurs at him and Haynes. The defendants asked the circuit court to dismiss Haynes' complaint, but the circuit court denied the motion. The court held that the Civil Rights Act was broad enough to protect Haynes' privilege to practice medicine without racial discrimination within the hospital, which was a place of public accommodation. The Court of Appeals reversed in an unpublished opinion, agreeing with the defendants that a hospital is not a place of public accommodation with respect to its relationship with physicians with staff privileges at the hospital. One judge dissented, and would have held that the Civil Rights Act prohibits denying a physician full and equal enjoyment of hospital staff privileges on the basis of race. Haynes appeals.

TATE v CITY OF DEARBORN (case no. 129241)
Attorney for plaintiff Charlene Tate: Victor S. Valenti/(248) 355-5555
Attorneys for defendant City of Dearborn: Laurie M. Sabon-Ellerbrake, Debra A. Walling/(313) 943-2035
Attorney for amicus curiae Attorney General: Ann M. Sherman/(517) 373-6434
Trial court: Wayne County Circuit Court
At issue: While in the Dearborn jail, the plaintiff was raped by a corrections officer. She sued the city of Dearborn in federal court, raising claims under 42 USC 1983 and state law, but the federal court granted summary disposition to the city and dismissed the lawsuit. The plaintiff then filed a second lawsuit in state court, this time alleging that the city's actions violated Michigan's Civil Rights Act. Does the federal court's earlier dismissal bar the plaintiff's second lawsuit? Is her Civil Rights Act claim barred by res judicata?
Background: Charlene Tate was raped by a corrections officer, Keith Fields, while Tate was serving a 90-day sentence in the Dearborn jail. Tate sued Fields and the city of Dearborn in the United States District Court for the Eastern District of Michigan. Tate alleged that the defendants violated federal law (42 USC 1983); her complaint also included state law claims for assault and battery, and gross negligence. The federal court granted the city's motion for summary disposition and dismissed Tate's lawsuit in its entirety. Tate then filed a second lawsuit in Wayne County Circuit Court, alleging that the city violated Michigan's Civil Rights Act. The city moved for summary disposition, claiming that, under the legal doctrine of res judicata, the federal court's dismissal also barred her from pursuing the related Civil Rights Act lawsuit in state court. The trial court denied the city's motion, reasoning that Tate's Civil Rights Act claim was not raised, decided, or necessarily determined in the federal lawsuit. The city appealed to the Court of Appeals, which reversed the trial court's ruling in an order. The Court of Appeals held that res judicata barred every claim that Tate, exercising due diligence, could have asserted in the federal suit and that, as a result, res judicata barred her Civil Rights Act claim. Tate appeals.

Afternoon Session

CITY OF MT. PLEASANT v STATE TAX COMMISSION (case no. 129453)
Attorney for petitioner City of Mt. Pleasant: Mary Massaron Ross/(313) 983-4801
Attorneys for respondent State Tax Commission: Ross H. Bishop, Heidi L. Johnson-Mehney/(517) 373-3203
Attorney for amicus curiae Michigan Municipal League Legal Defense Fund: William J. Danhof/(517) 487-2070
Attorney for amicus curiae Wayne County: Jeanne Hanna/(313) 224-5030
Tribunal: Michigan Tax Tribunal
MUNICIPAL EMPLOYEES RETIREMENT SYSTEMS OF MICHIGAN v CHARTER TOWNSHIP OF DELTA (case no. 129041)
Attorney for petitioner Municipal Employees Retirement Systems of Michigan: Kenneth W. Beall/(517) 482-2400
Attorney for respondent Charter Township of Delta: Michael D. Gresens/(517) 484-8000
Tribunal: Michigan Tax Tribunal
At issue: MCL 211.7m allows an exemption from the payment of ad valorem property taxes for

property "used for public purposes." In these two lawsuits, the Supreme Court will consider the claims of two taxpayers who argue that they are entitled to this exemption. Is a municipality entitled to the exemption for property it purchases for economic development, as the city of Mt. Pleasant argues? Where a governmental entity is charged with investing money to secure public employee pensions, is it entitled to the exception for the passive investments that it makes in vacant real estate, as the Municipal Employees Retirement Systems of Michigan argues?

Background: In 1990, the city of Mt. Pleasant purchased more than 320 acres of vacant land. The city wanted to extend city streets onto the new parcel, provide land for needed housing, and plat and prepare land for sale to developers for residential, commercial, and industrial uses. The property was vacant while it was owned by the city; most of it has since been sold to developers and government entities. The city assessor determined that the property was not exempt from ad valorem taxes. The city objected before the local Board of Review, but the assessment was affirmed. The city then filed a petition before the Michigan Tax Tribunal, seeking a ruling that the property was exempt under MCL 211.7m, which allows an exemption for property "used for public purposes." The Tax Tribunal found that the property was not exempt and that the city was required to pay taxes. It ruled that the city was not entitled to the exemption under MCL 211.7m, because it did not make a "present" use of the property but was holding the property for future development. The Court of Appeals affirmed in a published opinion, concluding that the city's "use" of the property was not an "active, actual" use, and did not qualify for the MCL 211.7m exemption. The city appeals.

The Municipal Employees Retirement System (MERS) was created by the state Legislature to administer the retirement system for municipal and judicial employees. MERS holds three parcels of vacant property, valued at $2 million, solely as an investment. The Charter Township of Delta assessed the property and sent MERS a tax bill. MERS protested the assessment to the local Board of Review, objecting to the amount of the assessment and also claiming that it was entitled to an exemption under MCL 211.7m. The Board of Review reduced the assessment but denied the exemption. MERS filed a petition with the Tax Tribunal, which denied MERS' request for an exemption. The Tribunal reasoned that, for the "public purpose" exemption in MCL 211.7m to apply, the property had to be used for a "present public purpose, and not merely held for speculation or profit." The Court of Appeals reversed in a published opinion, concluding that MERS' act of holding real estate for investment purposes is a "present use" and that MERS is entitled to the exemption. The township appeals.

NATIONAL WINE & SPIRITS, INC., et al. v STATE OF MICHIGAN, et al. (case no. 126121)

Attorneys for plaintiffs National Wine & Spirits, Inc., NWS Michigan, Inc., and National Wine & Spirits, L.L.C.: Louis B. Reinwasser/(517) 487-2070, Morton Siegel/(312) 658-2000

Attorney for defendant State of Michigan: Howard E. Goldberg/(248) 888-8800

Attorney for intervening defendant Michigan Beer & Wine Wholesalers Association: Anthony S. Kogut/(517) 351-6200

Attorney for amicus curiae General Wine & Liquor Company, Inc. and Vintage Wine Company: James Albert Smith/(313) 259-7777

Trial court: Ingham County Circuit Court

At issue: MCL 436.1205(3) prohibits an "authorized distribution agent" (i.e. wholesaler of liquor) from competing, or "dualing," with a wholesaler of wine, unless the liquor wholesaler was "dualing" in wine before September 24, 1996. Does this statute violate the Commerce

Clause of the U.S. Constitution? Does it violate the Equal Protection Clause of either the federal or Michigan constitutions?

Background: The plaintiffs challenge a Michigan statute, MCL 436.1205(3), which prevents liquor wholesalers, or authorized distribution agents (ADAs), from acting as wine wholesalers in some wholesaling markets. There is an exception for ADAs that were "dualing," or competing with wine wholesalers, before September 24, 1996. Plaintiff National Wine & Spirits, Inc. (National Inc.) is an Indiana corporation. The other two plaintiffs are subsidiaries of National Inc.; NWS Michigan, Inc. is an authorized distribution agent of liquor (ADA) in Michigan, and National Wine & Spirits, L.L.C. is a licensed wine wholesaler in Michigan. NWS Michigan became an ADA after September 24, 1996. National Wine & Spirits also became a licensed wine wholesaler after September 24, 1996. The plaintiffs contended that, on September 24, 1996, only in-state companies were licensed as wine wholesalers. As a result, MCL 436.1205(3) "effectively prohibits all out of state companies from serving as both an ADA of spirits and a licensed wholesaler of wine in Michigan," they claimed. The statute violates the Equal Protection Clause because it creates two classes of ADAs and the classification is not rationally related to any legitimate government purpose, the plaintiffs argued. Finally, the plaintiffs claimed that the statute violates the Commerce Clause because the law effectively precludes out-of-state ADAs from dualing in Michigan, since no out-of-state ADAs were dualing as of September 24, 1996. The trial court granted summary disposition to the defendant state of Michigan and intervening defendant Michigan Beer & Wine Wholesalers Association, and dismissed both of the plaintiffs' constitutional claims. The Court of Appeals affirmed the lower court's ruling in an unpublished opinion. The plaintiffs appealed to the Michigan Supreme Court, which first held the case in abeyance for the United States Supreme Court's ruling in *Granholm v Heald*, 541 US 1062; 124 S Ct 2389; 158 L Ed 2d 962 (2004). After the U.S. Supreme Court decided *Granholm*, the Michigan Supreme Court directed the parties in this case to appear for oral argument. Following oral argument, the Court granted leave to appeal.

Wednesday, October 4
Morning Session

PEOPLE v HERNANDEZ-GARCIA (case no. 129038)
Prosecuting attorney: Timothy K. McMorrow/(616) 632-6710
Attorney for defendant Angel Hernandez-Garcia: Thomas J. Mattern/(517) 402-7400
Attorney for amicus curiae Attorney General: Brad H. Beaver/(517) 373-4875
Trial court: Kent County Circuit Court
At issue: The defendant was charged with carrying a concealed weapon. He sought a jury instruction on the momentary innocent possession defense articulated in *People v Coffey*, 153 Mich App 311 (1986). Does the carrying-a-concealed-weapon statute, MCL 750.227(2), include a defense for momentary innocent possession?
Background: Defendant Angel Hernandez-Garcia was charged with carrying a concealed weapon (CCW) under MCL 750.227(2), which states that "[a] person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions

upon such license." In his defense, Hernandez-Garcia testified that he had taken the gun from two men who tried to sell him drugs, and that he intended to turn the gun over to the police. At trial, the judge gave preliminary instructions consistent with the Court of Appeals opinion in *People v Coffey*, 153 Mich App 311 (1986), which states that momentary innocent possession of a weapon resulting from disarming a wrongful possessor is a valid defense to a CCW charge, if the defendant had the intent of delivering the weapon to the police at the earliest opportunity. However, the judge's final jury instructions stated that momentary innocent possession of a concealed weapon did not constitute a defense. Hernandez-Garcia was convicted by a jury and sentenced to five months in jail. He appealed to the Court of Appeals. In a published opinion, the appeals court held that the Supreme Court's plain language analysis in *People v Pasha*, 466 Mich 378 (2002), undercut *Coffey's* policy-based analysis. As a result, the court found that *Coffey* was not binding precedent, and it affirmed Hernandez-Garcia's conviction. Hernandez-Garcia appeals.

KARACZEWSKI v FARBMAN STEIN & COMPANY, et al. (case no. 129825)
Attorney for plaintiff Kenneth Karaczewski: James P. Harvey/(313) 961-7363
Attorney for defendants Farbman Stein & Company and Nationwide Mutual Insurance Company: Martin L. Critchell/(248) 593-2450
Attorney for amicus curiae Wayne County Prosecutor's Office: Timothy A. Baughman/(313) 224-5792
Tribunal: Worker's Compensation Appellate Commission
At issue: A worker from Detroit, hired under a contract made in Michigan, was injured at his Florida worksite. MCL 418.845 states that the Michigan worker's compensation system has jurisdiction over an out-of-state injury when the contract is made in Michigan and the injured person is a Michigan resident. But the Supreme Court has twice held, most recently in *Boyd v W G Wade Shows*, 443 Mich 515 (1993), that the Michigan worker's compensation system can have jurisdiction over non-residents, as long as the contract of hire was made in Michigan. Do Michigan courts have jurisdiction over Karaczewski's request for worker's compensation benefits? Should *Boyd* be overruled?
Background: Kenneth Karaczewski, then a Detroit resident, was hired by Farbman Stein & Company in 1984 to work in Michigan as a maintenance engineer. Farbman Stein & Company was a Michigan employer, and the contract of hire was made in Michigan. In 1986, Karaczewski was transferred by Farbman Stein & Company to the position of building superintendent in Fort Lauderdale, Florida. About 10 years later, he injured his left knee while working for the company in Florida. He filed a worker's compensation claim, seeking medical and wage loss benefits under Michigan law. Farbman Stein & Company, and its worker's compensation carrier, Nationwide Mutual Insurance Company, challenged the jurisdiction of Michigan's worker's compensation bureau over Karaczewski's claim. They cited MCL 418.845, which states that "[t]he bureau shall have jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a resident of this state at the time of injury and the contract of hire was made in this state . . . ." The defendants' jurisdictional challenge was rejected by the Workers' Compensation magistrate, the Workers' Compensation Appellate Commission, and the Court of Appeals, all of which relied on *Boyd v W G Wade Shows*, 443 Mich 515 (1993). In *Boyd*, the Supreme Court held that the bureau has jurisdiction over controversies involving out-of-state injuries suffered by out-of-state residents, so long as the contract of hire was made in Michigan. The defendants now appeal to the

Supreme Court, arguing that *Boyd* should be overruled and that Karaczewski's claim for benefits should be dismissed. Karaczewski responds that the rule of law set forth in *Boyd* has been in place for more than 70 years, has been accepted by the legislature, and should not be overturned.

ROWLAND v WASHTENAW COUNTY ROAD COMMISSION (case no. 130379)
Attorney for plaintiff Joanne Rowland, a/k/a Joan Rowland: James McKenna/(586) 779-7810
Attorney for defendant Washtenaw County Road Commission: Jon D. Vander Ploeg/(616) 774-8000
Attorney for amicus curiae Michigan Municipal League, Michigan Municipal League Liability & Property Pool, and Michigan Townships Association: Mary Massaron Ross/(313) 983-4801
Attorney for amicus curiae Michigan Municipal Risk Management Authority: Marcelyn A. Stepanski/(248) 489-4100
Attorney for amicus curiae Michigan Trial Lawyers Association: Liisa R. Speaker/(517) 321-9770
Attorney for amicus curiae Attorney General: Patrick F. Isom/(517) 373-1479
Trial court: Washtenaw County Circuit Court
At issue: The plaintiff sued the Washtenaw County Road Commission, claiming that she was injured when she stepped in a pothole located in a crosswalk. The Road Commission argued that it is entitled to governmental immunity and that the plaintiff failed to give adequate and timely notice of her injury, as required by statute. But the Court of Appeals held that the Road Commission must show that it suffered "actual prejudice" as a result of any errors in notice under *Hobbs v State Highway Dep't*, 398 Mich 90 (1976), and *Brown v Manistee County Road Comm'n*, 452 Mich 354 (1996), and that it failed to do so. Did the plaintiff provide the required statutory notice? Should the actual-prejudice rule of *Hobbs* and *Brown* be reconsidered? If *Hobbs* and *Brown* are overruled, should the Supreme Court's ruling have retroactive application? Is the Road Commission immune from suit?
Background: Joanne Rowland sued the Washtenaw County Road Commission, claiming that she fell after stepping into a pothole in a crosswalk. One hundred and forty days after Rowland's fall, her attorney notified the Road Commission that he had been retained to investigate and evaluate Rowland's personal injury claim; he also provided a general description of the accident's location. After Rowland filed her lawsuit, the Road Commission moved for summary disposition, asking the court to dismiss Rowland's claims. The Road Commission noted that MCL 691.1404 requires: "As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." The Road Commission argued that Rowland's notice was deficient in two ways: it was late, and it did not contain the information required by the statute. As a result, the Road Commission contended, it was prejudiced by its inability to investigate and defend the claim; the Commission noted that the area where Rowland claimed she was injured was repaved shortly after the Commission received Rowland's notice. The Road Commission also argued that it was entitled to governmental immunity against Rowland's claim. But the circuit court denied

the Road Commission's motion and the Court of Appeals affirmed in an unpublished opinion. The Court of Appeals noted that actual prejudice was required under *Hobbs* and *Brown*, and that the road commission failed to demonstrate actual prejudice because it had an opportunity to investigate the conditions of the road surface and failed to do so. The Court of Appeals also rejected the road commission's immunity claim. The Road Commission appeals.

Afternoon Session

BIERLEIN v SCHNEIDER (case no. 128913)
Attorney for plaintiffs Norma R. Bierlein, et al.: David B. Meyer/(989) 792-9641
Attorney for defendants Mark Schneider and Mary Schneider: Raymond W. Morganti/(248) 357-1400
Trial court: Saginaw County Circuit Court
At issue: A personal injury action involving a minor plaintiff was settled, but not in compliance with MCR 2.420(B)(3) and (4)(a): no conservator was appointed and no bond was approved by or filed with the probate court. More than one year passed before it was discovered that the minor child's attorney embezzled the settlement funds; the Court of Appeals held that the case could not be reopened. Under these circumstances, did the circuit court have subject matter jurisdiction to approve the settlement and enter an order of dismissal? Should the settlement be reopened?
Background: Samantha Bierlein, a child, suffered brain damage in an accident involving an automobile owned and operated by Mark and Mary Schneider. Norma Bierlein sued the Schneiders on her daughter's behalf. The parties reached a settlement, which the trial court approved in 1997. The Schneiders' insurance company paid the settlement and the lawsuit was then dismissed. But the trial court did not insist upon compliance with the requirements of MCR 2.420(B)(3) and (4)(a): no conservator was appointed to protect the child's interests and no bond was approved by or filed with the probate court. In 2001, Bierlein informed the trial court that, although she had made repeated inquiries to Patrick Collison, the attorney who settled the lawsuit, she was unable to locate the settlement proceeds that Collison had supposedly invested on her daughter's behalf. Her inquiry prompted a series of hearings, and a conservator was appointed for her daughter. Soon after, it was discovered that Collison had embezzled the money. At this point, the trial court granted relief from the order of dismissal and reopened the settlement proceedings. The Schneiders appealed to the Court of Appeals, which ruled in an unpublished opinion that the trial court erred in reopening the settlement. The appeals court remanded the case to the trial court for further proceedings. On remand, the trial court reinstated the original order of dismissal. Bierlein and the appointed conservator appealed this ruling to the Court of Appeals, which denied leave to appeal for lack of merit. Bierlein and the conservator appeal.

Thursday, October 5
Morning Session Only

IN RE PETITION BY TREASURER OF WAYNE COUNTY FOR FORECLOSURE (case no. 129341)
Attorney for petitioner Wayne County Treasurer: Mary Massaron Ross/(313) 983-4801
Attorney for respondent Perfecting Church: Jason D. Killips/(248) 645-1483

Attorney for intervening parties Matthew Tatarian and Michael Kelly: Brad B. Aldrich/(734) 404-3000
Attorney for amicus curiae City of Detroit: Joanne D. Stafford/(313) 237-3069
Attorney for amicus curiae Michigan Department of Treasury: Kevin T. Smith/(517) 373-3203
Attorney for amicus curiae Michigan Association of County Treasurers: Stacy R. Owen/(517) 374-9100
Attorney for amicus curiae High Praise Cathedral of Faith Ministries: Kenneth G. Frantz/(248) 720-0290
Attorney for amicus curiae Michigan Land Bank Fast Track Authority: Kevin Lee Francart/(517) 373-1162
Attorney for amicus curiae Michigan State Housing Development Authority: Matthew H. Rick/(517) 373-1162
Attorney for amicus curiae Westhaven Manor LDHA LP: Kevin J. Roragen/(517) 482-2400
Trial court: Wayne County Circuit Court
At issue: Can a trial court set aside a judgment of foreclosure under MCR 2.612(C) upon finding that the property owner did not receive constitutionally adequate notice of the proceedings? Or is such relief prohibited by MCL 211.78l of the General Property Tax Act, which states that, if a judgment of foreclosure has entered, a property owner who claims lack of notice cannot bring an action for possession of the property, but is limited to "an action to recover monetary damages . . ."? Is MCL 211.78l constitutional?
Background: The foreclosure at issue in this case was part of a mass foreclosure filing by the Treasurer of Wayne County, who sought to foreclose on thousands of properties due to unpaid taxes, including a parcel owned by the Perfecting Church. A judgment of foreclosure was entered on March 10, 2003. Matthew Tatarian and Michael Kelly purchased the property at auction from the Wayne County Treasurer and received a quit claim deed on November 4, 2003. Perfecting Church then filed a motion for relief from judgment, alleging that it did not receive notice of the foreclosure. Perfecting Church sought relief under MCR 2.612(C); that court rule permits a court to grant relief from a judgment that is procured through mistake or fraud, or is void. The rule also contains a general provision granting a circuit court the authority to set aside a judgment for "[a]ny other reason justifying relief." The circuit court determined that Perfecting Church was entitled to relief under MCR 2.612(C), and entered an order vacating the judgment of foreclosure. Tatarian and Kelly filed an application for leave to appeal to the Court of Appeals, arguing that the circuit court lacked jurisdiction to take any action once the judgment of foreclosure had entered. They argued that MCL 211.78l(1) states that an owner who did not receive notice "shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section." They also noted that MCL 211.78l(2) states that the "court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section." The Court of Appeals denied the application for leave to appeal; the court had previously held in *Wayne County Treasurer v Westhaven Manor Limited*, 265 Mich App 285 (2005), that a circuit court retains the jurisdiction to set aside a judgment of foreclosure under MCR 2.612(C), notwithstanding the provisions of MCL 211.78l. Tatarian and Kelly appeal.

FLUOR ENTERPRISES, INC. v DEPARTMENT OF TREASURY (case no. 129149)
Attorney for plaintiff Fluor Enterprises, Inc.: Patrick R. Van Tiflin/(517) 377-0702
Attorney for defendant Department of Treasury: Ross H. Bishop/(517) 373-3203
Trial court: Court of Claims
At issue: The plaintiff performed out-of-state design and planning services for construction projects in Michigan. The Michigan Department of Treasury ruled that a provision of the Single Business Tax (SBT) applied to the revenues from these activities. The Court of Appeals agreed, but held that the taxation of out-of-state revenues was unconstitutional. Did the Court of Appeals correctly interpret the SBT? Is this provision of the SBT unconstitutional?
Background: Fluor Enterprises is a multi-national corporation based in Irvine, California that provides engineering, construction management, and design services. For the tax years in question, Fluor Enterprises performed construction management and materials procurement services in Michigan; it also provided engineering and architectural design services outside the state for Michigan projects. Fluor Enterprises reported the income from its construction management and material procurement activities as Michigan sales under the Single Business Tax (SBT) Act. It did not, however, report the income from the engineering and architectural design services. The Michigan Department of Treasury audited Fluor Enterprises' tax liability and concluded that it had underreported its Michigan income because its receipts for engineering and architectural design services were Michigan income. MCL 208.53(c)states that "[r]eceipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts." The Michigan Commissioner of Revenue agreed with the department's analysis of the statute. Fluor Enterprises paid the tax and interest due, and then filed an action in the Court of Claims, seeking a refund of the tax and interest. Fluor Enterprises challenged the Commissioner of Revenue's interpretation of MCL 208.53(c). Moreover, if the Commissioner's interpretation is correct, the tax violates the Commerce Clause of the U.S. Constitution, Fluor Enterprises contended. The Court of Claims ruled in Fluor Enterprises' favor, finding that the SBT did not tax design services performed wholly outside of Michigan. In a published opinion, the Court of Appeals agreed with the Department of Treasury that MCL 208.53(c) treats revenue derived from out-state design services as taxable Michigan sales. But the court found that the tax as applied to Fluor Enterprises violated the Commerce Clause, because it was not fairly apportioned and discriminated against interstate commerce. The Department of Treasury appeals, seeking reversal of the Court of Appeals declaration that MCL 208.53(c) is unconstitutional as applied to Fluor Enterprises. Fluor Enterprises also appeals, claiming that the Court of Appeals erred when it held that MCL 208.53(c) applies to out-state design services.

TAXPAYERS OF MICHIGAN AGAINST CASINOS, et al. v STATE OF MICHIGAN, et al. (case nos. 129816, 129818, 129822)
Attorneys for plaintiffs Taxpayers of Michigan Against Casinos and Laura Baird, State Representative in her official capacity: Robert J. Jonker, John J. Bursch/(616) 752-2000
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Attorneys for amicus curiae Little River Band of Ottawa Indians, Nottawaseppi Huron Band of Potawatomi, and, Pokagon Band of Potawatomi Indians: Jo Anne House/(231) 398-0594, Michael G. Phelan/(269) 782-6526, Geoffrey L. Gillis/(616) 459-7100
Trial court: Ingham County Circuit Court
At issue: The Governor negotiated compacts with several Indian tribes covering gambling on tribal lands. The Legislature approved the compacts by concurrent resolution. In 2004, the Supreme Court remanded this case to the Court of Appeals to consider the constitutionality of the gaming compacts. On remand, the Court of Appeals held, in a published, split decision, that the compacts' amendatory provision, which allows the Governor to amend the compacts without legislative approval, violates the separation of powers clause. Are the gaming compacts constitutional?
Background: In 1998, the Governor reached an agreement with four Indian tribes on compacts to permit casino gambling on lands the tribes own in a number of western Michigan counties. On December 10, 1998, the House and Senate adopted House Concurrent Resolution (HCR) No. 115 approving the compacts. On June 10, 1999, Taxpayers of Michigan Against Casinos, a non-profit corporation, and Laura Baird, then a state representative who voted against the compacts, filed a lawsuit in Ingham County Circuit Court. They sought a ruling that the compacts violated the Michigan Constitution. The plaintiffs argued in part that the compacts were legislation that had not been approved in accordance with constitutional requirements, and that the terms of the compacts violated separation of powers. The defendants responded that approving the compacts was not a legislative act because the tribes' operations are not subject to the Legislature's control. Similarly, the compacts are not legislative because they are contracts which required the approval of both the state and the tribes, whereas legislation only requires action by the Legislature, the defendants contended. The circuit court disagreed, declaring that HCR 115 was legislation enacted through unconstitutional means and that the terms of the compacts violated separation of powers by giving the Governor unrestricted authority to amend their terms. The Court of Appeals reversed in a published opinion, rejecting the plaintiffs' challenge to the manner in which the compacts were approved. The court did not rule on the separation-of-powers argument, noting that the Governor had not yet attempted to exercise any power under the amendatory provisions. The plaintiffs appealed to the Supreme Court which held, in a 2004 opinion, that the compacts were properly approved by the Legislature. The Supreme Court also declined to rule on the separation-of-powers issue. Instead, the Supreme Court remanded the case to the Court of Appeals, noting that, in the year following the Court of Appeals opinion, the Governor had exercised her authority under the compacts' amendatory provision. As a result, the separation-of-powers issue was now ripe for review in the Court of Appeals. On remand, the Court of Appeals held, in a two-to-one published opinion, that the compacts' amendatory provision violates the separation of powers clause. The State of Michigan and the Little Traverse Bay Bands of Odawa Indians appeal this ruling. The plaintiffs also appeal, arguing that the compacts are unconstitutional appropriations of state funds.

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